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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 596

FRED O. LOWE, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 40–46) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 29, 1940 (R. 46). The petition for writ of certiorari was filed November 26, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules of this Court, promulgated May 7, 1934.

QUESTIONS PRESENTED

1. Whether the indictment sufficiently alleged schemes to defraud falling within the condemnation of the Mail Fraud Statute.

2. If so, whether the uses of the mails alleged were in execution of the fraudulent schemes.

STATUTE INVOLVED

The pertinent provisions of the Mail Fraud Statute (Section 215, Criminal Code; U. S. C. Title 18, Section 338) are as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter * * * in any * * * authorized depository for mail matter, * * * to be sent or delivered by the post-office establishment of the United States * * * ~~any~~ * * * ~~letter~~ * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

On August 4, 1938, an indictment in three counts was returned against the petitioner in the United States District Court for the Western District of Wisconsin (R. 1–5). Each count of the indictment purported to charge petitioner with having caused the mails to be used in furtherance

of a scheme to defraud, in violation of the Mail Fraud Statute.

The petitioner was convicted upon all counts of the indictment (R. 6, 8, 16), and was sentenced to imprisonment for two years on each of the three counts, the sentences to run concurrently, and to pay a fine of $1,500 on each count, payment of the fine imposed under count 1 to be in satisfaction of the fines imposed under the remaining two counts (R. 6–7).[1] On appeal the Circuit Court of Ap-

[1] Petitioner points (Pet. 3, 7) to error committed by the District Court in imposing a fine of $1,500 under each count, the maximum fine imposable under the Mail Fraud Statute being $1,000 (*supra*, page 2). This point does not seem to have been presented either in the District Court or in the Circuit Court of Appeals. It is well settled that where a punishment imposed exceeds that permitted by the governing statute the sentence is void, at least as to the excess, and the court imposing the punishment has the power so to correct its sentence as to bring it within the maximum authorized by the statute. (*In re Bonner*, 151 U. S. 242, 258–260; *United States* v. *Pridgeon*, 153 U. S. 48, 62–63; *Williams* v. *United States*, 168 U. S. 382, 389; *De Bara* v. *United States*, 99 Fed. 942, 948 (C. C. A. 6th); *Carter* v. *Snook*, 28 F. (2d) 609 (C. C. A. 5th). See also *Husty* v. *United States*, 282 U. S. 694, 703; *Fleisher* v. *United States*, 302 U. S. 218, 219). This it may do even though the term at which the sentence was rendered has expired. (*Bryant* v. *United States*, 214 Fed. 51, 53–54 (C. C. A. 8th); *Mossew* v. *United States*, 266 Fed. 18, 22 (C. C. A. 2d); *Hammers* v. *United States*, 279 Fed. 265, 266–267 (C. C. A. 5th); *Copeland* v. *Archer*, 50 F. (2d) 836, 838 (C. C. A. 9th); *De Benque* v. *United States*, 85 F. (2d) 202, 207 (App. D. C.), certiorari denied, 298 U. S. 681.) It would seem, therefore,

peals for the Seventh Circuit unanimously affirmed the judgment of conviction (R. 40–46).

Since the evidence has not been preserved by bill of exceptions, the question of petitioner's *bona fides* (Pet. 18–19) is not involved. The sole question presented is the sufficiency of the indictment. Count one of the indictment (R. 1–2) charged in substance that the petitioner devised the following scheme and artifice to defraud: He drew a check upon a bank in which he maintained a checking account in a fictitious name, knowing that there were insufficient funds in this account to pay the check. He then deposited this check in another bank in another town, in which he maintained a checking account under his true name. The latter bank gave him credit for this deposit in his checking account, and thereupon mailed the check for collection in the regular course of business to a third bank. It was this mailing which the petitioner was charged with having caused. A more detailed analysis of this count is contained in the opinion below (R. 41–42).

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that petitioner's sentences can be corrected by the District Court on motion of the petitioner at any time. This Court also has power itself, the authorities indicate, to correct the sentences. *Blitz* v. *United States*, 153 U. S. 308, 318; *D'Allessandro* v. *United States*, 90 F. (2d) 640 (C. C. A. 3d); *Johnson* v. *United States*, 32 F. (2d) 127, 130 (C. C. A. 8th); *Spirou* v. *United States*, 24 F. (2d) 796, 797 (C. C. A. 2d), certiorari denied, 277 U. S. 596; *Haynes* v. *United States*, 101 Fed. 817, 820 (C. C. A. 8th). However, the Government has, of course, no objection to the remanding of the case to the District Court at this time for correction of the sentences.

Inasmuch as the petitioner was given a concurrent sentence on each count and the first count is clearly sufficient, there is no necessity for considering the adequacy of the remaining two counts.[2]

ARGUMENT

Petitioner contends that the first count is fatally defective in that it does not sufficiently allege a scheme to defraud falling within the condemnation of the Mail Fraud Statute.[3] His principal arguments in this respect are that it must appear from the face of the indictment that a fraud would be perpetrated if the scheme or artifice was consummated, and that the Circuit Court of Appeals read into the indictment certain facts in order to

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[2] These counts are quite similar to the first count. The scheme charged in count two (R. 2–3) was that petitioner obtained from one bank and deposited in another to the credit of his checking account certain bank money orders which petitioner obtained without paying anything therefor and which he knew were issued without consideration and without authority. The scheme charged in the third count (R. 3–5) was the deposit in one bank of worthless checks drawn on other banks and the receiving by the petitioner from the bank of deposit of credit in his checking account, cash and bank money orders. Both counts charged that he caused the use of the mails in connection with the transmission for collection in the ordinary course of business of the items deposited by him.

[3] The petition (Pet. 1, 5), the docket entries (R. 11, 15) and the opinion of the Circuit Court of Appeals (R. 40) refer to the several motions of the petitioner to dismiss the indictment. What the grounds of these motions were is not apparent from the record since the motions are not contained therein.

make out a scheme or artifice within the purview of the statute.[4]

There can be no doubt that the first count (*supra*, p. 4) sufficiently charged a scheme or artifice to defraud. As the Circuit Court of Appeals pointed out (R. 42), the presentation by the petitioner to the bank of deposit of the worthless check drawn by him under a fictitious name on another bank in which he did not have sufficient funds to pay it, constituted a false representation that the check was drawn by the person who purported to draw it and that it represented a credit of that person in the drawee bank independently of any liability thereon by the petitioner to whose order it was drawn. As a result of this device, as the court further pointed out (R. 42), the bank of deposit was induced to give the petitioner a credit in his checking account in that bank to which he obviously was not entitled. It is clear, therefore, that a fraud was perpetrated upon the bank of deposit. It matters not that the indictment did not allege that the scheme was successful or that loss occurred to the bank of deposit through the drawing of checks upon the credit, a proposition which, it was stated in the opinion of the court below, was not questioned by the petitioner (R. 42).

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[4] Petitioner also asserts, in effect (Pet. 2), without argument or citation of authorities, that a scheme or artifice to come within the ambit of the Mail Fraud Statute must be

That the Circuit Court of Appeals did not read anything into the indictment when it said that by the scheme petitioner "intended to obtain checking account credit from the Chaseburg Bank [the bank of deposit]" (R. 42) is evident from the indictment which states that "Fred O. Lowe did * * * deposit said check at the said Chaseburg State Bank to the credit of the checking account of said Fred O. Lowe" (R. 2).

2. Petitioner's principal contention with respect to the scheme alleged in the first count is that that scheme had terminated before the bank of deposit sent the check in the regular course of business by mail to another bank for collection. His position

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fraudulent at common law or must be made so by some statutory provision. There is clearly no basis for any such contention. *Durland* v. *United States*, 161 U. S. 306, 312–313.

Petitioner also asserts (Pet. 2), without argument or citation of authorities, that the scheme must be one which contemplates or requires the use of the mails and that the schemes in question were not of this character. It is settled, however, that under the Mail Fraud Statute it is not necessary to allege that the schemer intended to use the mails as part of his scheme, it being sufficient if he actually uses them or causes them to be used in furtherance of the scheme. *United States* v. *Young*, 232 U. S. 155, 161; *Silkworth* v. *United States*, 10 F. (2d) 711, 719 (C. C. A. 2d), certiorari denied, 271 U. S. 664; *Tincher* v. *United States*, 11 F. (2d) 18, 20, 21 (C. C. A. 4th), certiorari denied, 271 U. S. 664; *Wolpa* v. *United States*, 86 F. (2d) 35, 40 (C. C. A. 8th), certiorari denied, 299 U. S. 611; *Bogy* v. *United States*, 96 F. (2d) 734, 740 (C. C. A. 6th), certiorari denied, 305 U. S. 608.

is that the scheme terminated when the bank of deposit credited the check to his checking account, and that the mailing charged could not have been, therefore, in execution or furtherance of the scheme. And he cites as in conflict with the decision below the decision of the Circuit Court of Appeals for the Tenth Circuit in *Dyhre* v. *Hudspeth,* 106 F. (2d) 286.

Petitioner's contention was completely disposed of by the Circuit Court of Appeals when it said (R. 44):

> * * * the scheme of defendant, as revealed by the allegations of the indictment, was in substance a check kiting arrangement which could be successful, even temporarily, only because of the practice of the depositing bank of forwarding the check through its correspondent bank for collection from the account of the drawer in the drawee bank. The defendant included in his scheme the use of a banking practice which necessarily required the forwarding of the deposited check for collection, a practice which would enable the defendant to utilize, at least temporarily, the credit given him by the Chaseburg Bank; and the utilization of this practice was as much a part of the scheme to obtain credit as the drawing and presenting of the worthless check.

Dyhre v. *Hudspeth,* 106 F. (2d) 286 (C. C. A. 10th), *supra,* is clearly distinguishable. In that case each of the schemes charged was one to de-

fraud a merchant by obtaining merchandise in return for a worthless check drawn by the defendant on an out-of-town bank. The court held that the schemes had terminated when the defendant obtained the merchandise since "He had thus accomplished all he set out to do" and, therefore, that the subsequent forwarding of the fraudulent checks through the mails for collection could not have been for the purpose of executing the fraudulent schemes.

Here, however, the scheme charged was one to defraud a bank. The utilization by the petitioner of the two checking accounts in obtaining the checking account credit was inseparably tied up with the banking practice of forwarding the deposited check for collection and this involved the use of the mails, in the regular course of business, by the bank in which the check was deposited by the petitioner. This banking practice assured the petitioner of the use of the checking credit at least until payment of the check was refused by the drawee bank. The scheme to defraud, therefore, depended for its success upon this banking practice and consequently continued until, pursuant to such practice, the credit became no longer available to the petitioner; it did not terminate when the petitioner received the credit in his checking account for the check deposited.

In *Goodman* v. *United States,* 97 F. (2d) 197 (C. C. A. 3d), certiorari granted 305 U. S. 587,

but dismissed 305 U. S. 578, also cited by the petitioner, no question was presented as to whether the scheme had terminated at the time the mails were used.

CONCLUSION

The decision of the Circuit Court of Appeals was correct and there is involved no real conflict of decisions or any important question of federal law. The petition should, therefore, be denied unless this Court either itself decides to correct the sentences insofar as they imposed fines in excess of the maximum permitted by the Mail Fraud Statute, or desires to remand the case to the District Court for that purpose. (See footnote 1, *supra*, pp. 3–4.)

FRANCIS BIDDLE,
Solicitor General.
O. JOHN ROGGE,
Assistant Attorney General.
M. JOSEPH MATAN,
W. MARVIN SMITH,
Attorneys.

DECEMBER, 1940.

End

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